No. 12441

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

v.

KILIAN W. SMITH,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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SUBJECT INDEX

TABLE OF CASES

TEXTBOOKS

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STATEMENT OF CASE

We submit that there is absolutely no basis for counsel's charges that appellant's inspection of the baled hops was not made in good faith and that the rejection was not for the reasons the appellant stated (Br. 23, XV). The record shows that the inspection was made in the manner normal to the trade, and that the samples

on which the rejection was based actually showed the mildew damage for which the appellant rejected the hops (Tr. 123, 181, 186, 282, 290, 291).

The record clearly shows that the rejection of the entire lot of hops was not decided merely upon examination of the first preliminary sample, as counsel infer. The appellant's telegram of September 16, 1947 to Mr. Paulus (Ex. 17) is amplified and explained by its letter to Mr. Paulus of the same date (Ex. 16) stating that "we will not accept such hops", obviously referring to such of the hops as would grade no better than that sample. Mr. Oppenheim testified such was his intent, and Mr. Paulus so construed the instructions (Tr. 315, 250). As soon as the appellant was advised that these first samples might not be representative of the entire lot, it instructed Mr. Paulus to obtain representative tenth bale samples, on the basis of which the hops were rejected (Tr. 299).

It is undisputed that when these hops were rejected there was an actual scarcity of prime quality cluster hops and that the market for such hops remained high (Geschwill Tr. 475, 476). Rejection of hops by the appellant in 1947 forced it to replace such hops on the open market to fill its brewer commitments (Geschwill Tr. 440, 437, 453).

Finally, counsel's challenge of the appellant's good faith is conclusively refuted by the appellant's offer to buy the appellee's surplus fuggle hops at 91¢ per pound to replace the rejected 84¢ cluster hops (Tr. 231, 241, 242).

Counsel's statement that the market "had adjusted to the mildew" by establishing a 5¢ per pound premium for the mildew-resistant fuggles (Br. 19) expresses merely counsel's own conclusion unsupported by the record. The record does not reveal any relation between that price differential and the mildew-resistant characteristic of the fuggles. Such relationship certainly is not indicated merely by Mr. Oppenheim's testimony cited by counsel.

ARGUMENT

For convenience of the court, the discussion herein of appellee's argument is grouped under the appropriate numbered headings of the appellant's original brief.

I

The appellee argues (Br. 28) that the appellant cannot claim a warranty. The appellant's case is not dependant upon any warranty or breach of warranty. The appellant's defense to the appellee's action for the contract price is that the appellee failed to deliver merchandise of the quality called for by the contract.

Counsel's attempt to construe the contract as a purchase of the "entire crop" on the vines (Br. 28, 29, VIII) disregards the unambiguous language and obvious intent of the contract. The "sales slip" referred to by counsel (Ex. 2) obviously is merely a memorandum which was superseded by the subsequent contract on

which the appellee bases this action (Tr. 3, 1-18, 108, 146, 195). The appellant contracted to buy only such of the crop as met the contract's express description when processed and baled.

Hugo V. Loewi v. Long, 76 Wash. 480, 136 Pac. 673, is not in point. There no subsequent contract was executed to replace the letters and telegrams which expressed the agreement.

Gonter v. Klaber & Co., 67 Wash. 84, 120 Pac. 533, involved a contract to buy the grower's entire crop then baled. The contract contained no further description of the hops. This was clearly a sale of existing specific goods and bears no similarity to the contract here involved.

Mr. Oppenheim's testimony did not put in issue the brewing value of the appellee's hops and thus open the door, as counsel contend (Br. 21), to the evidence of chemical content which *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636, holds is immaterial in determining contract quality of hops. The Oppenheim testimony cited by counsel is simply that some brewers may make laboratory tests of their hops to determine the quantity required for each brew (Tr. 322). This is in no way connected with the issue of standard of quality as applied in the contract between the grower appellee and the dealer appellant.

Here, as in the Geschwill case, the appellee is forced to rely upon something less than complete conformance with the contract description of the hops. He contends there was "substantial" performance, that his hops were

equal in quality to the 1947 Willamette Valley "average", and were "merchantable". Inasmuch as counsel adopt by reference much of their argument on these subjects in appellee Geschwill's brief, our reply thereto, pages 4 to 7 of the reply brief in the Geschwill case, is incorporated herein by this reference.

Wolf v. Edmunson, 240 Fed. 53, cited on pages 21 and XIX of appendix of appellee's brief, is no authority for the appellee's contention that tender of "merchantable" hops was sufficient without compliance with the contract's express description. There was testimony in that case relative to the chemical value of the hops. The court approved the trial court's instruction to the jury that in considering whether or not the hops were of the quality required by the contract, the chemical value of the hops was not a controlling test, and that the jury must consider the value of the hops in the market rather than their inherent or chemical value, inasmuch as the contract was made with the market value in view.

The absurdity of the "average quality" theory is demonstrated by comparison of the Geschwill and Smith versions of 1947 "average quality". The Geschwill hops, with 5% mildew, are described as a "good, average crop" (Geschwill Tr. 223). The hops of appellee Smith, with 50% mildew, likewise are described as "average" for that year (Tr. 182).

Standard Cotton-Seed Oil Co. v. Excelsior Refining Co., 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386, cited by counsel (Br. 26), does not support the proposition that a contract for "prime" quality is satisfied by

tender of "prime of the season". The court there decided merely that the tendered oil was in fact of contract quality.

Counsel's description of the contracted hops as "prime quality 1947 hops showing some mildew" (Br. 26) is meaningless. The presence or extent of mildew is not the issue. Failure of the tendered hops to meet the contract description is not attributed merely to the presence of some mildew, but to the results thereof—the immaturity of the hops, their unsound condition, lack of good color, and failure to constitute prime quality.

Mr. Cornoyer, appellee's witness, did not, as the discussion on page 20 of appellee's brief would indicate, limit his testimony to discussion of prime quality in prior years. He described the samples of appellee's hops as showing mildew and stated that the color caused by such mildew is not a "good color". A complete reading of his testimony makes it clear that in his expert judgment the appellee's hops could not have graded prime quality for 1947 or any year (Tr. 180-186).

II and III

The appellant contracted for hops of a certain express description, that is, hops of prime quality, fully matured, of good color and in sound condition. The hops tendered did not meet that description, so there was a plain failure of consideration.

There is no evidence that it was impossible for the appellee to produce and tender some hops which would

have met the contract requirements. Difficulty does not necessarily amount to impossibility. 6 *Williston on Contracts,* Rev. Ed., Sec. 1931.

Furthermore, the appellee's assertion of impossibility is not for the purpose of relieving him of any performance, but is an attempt to force the buyer to take, at full contract price, less than it bargained for. Inasmuch as the appellee knew of mildew in his yard when he executed the contract and nevertheless expressly agreed to deliver hops of a certain description, he clearly thereby assumed the risk of being able to deliver hops of that description. 6 *Williston on Contracts,* Rev. Ed., Sec. 1948. His experience as a hop dealer before going into the business of growing hops must have made him keenly aware of the obligations and risk which he assumed (Tr. 95, 143).

The appellee's argument relative to waiver and estoppel arising from the appellant's knowledge of mildew in the growing crop disregards the fact that there is no finding or conclusion by the trial court of waiver or estoppel, nor any finding from which such may be implied. The trial court expressly found that the appellee duly performed all of the terms and conditions of the agreement on his part to be performed (Finding 8, Tr. 51). This amounts in effect to a finding that there was no waiver or estoppel, for if the appellee fully performed, then there could have been no reliance upon the claimed acts of the appellant and hence no basis for waiver or estoppel. The authorities cited on pages 11 and 12 of the reply brief in the Geschwill case are equally in point here and by this reference are herein incorporated.

In view of the express finding of complete performance, there can be no implied finding of waiver or estoppel, for such would result in an inconsistency of findings which would require a reversal of the judgment. *United States v. Jefferson Electric Mfg. Co.,* 291 U.S. 386, 78 L. Ed. 859, 54 S. Ct. 443. *Winnett v. Helvering,* 68 Fed. 2d 614 (C.C.A. 9).

Furthermore, there is no finding of the essential elements of waiver and estoppel, as set forth in the appellant's reply brief in the Geschwill case, pages 10 to 12, which are by this reference incorporated herein. Neither Finding 5 (Tr. 50) nor Finding 7 (Tr. 51), relied upon by the appellee's argument, separately or in combination, cover those essential elements. The issue of fact involved is not whether or not there was some or any mildew in the hops. The question is whether or not the hops as tendered by the appellee were of prime quality, fully matured, in sound condition, not affected by mold, of good color, and otherwise in compliance with the contract description. Certainly the trial court did not find, expressly or by implication, that any of these contract requirements were waived or that the appellant is estopped from relying thereon.

Furthermore, there is no substantial evidence which would support any finding of waiver or estoppel.

The authority of Mr. Paulus and Mr. Fry to deal with appellee did not include any authority to change or waive any provision of the written contract or to accept any hops for the appellant while on the vines or at any time prior to their tender in bales (Tr. 206, 216, 224,

229, 292). The trial court made no finding of any such authority. An agent's authority is measured and determined, not by his acts, but by those of his principal. *Phez Co. v. Salem Fruit Union,* 233 Pac. 547, 113 Or. 398, at 429.

The appellee's effort to establish waiver or estoppel excusing him from compliance with the written contract centers around the contention that Mr. Fry "instructed" the appellee to continue harvesting, and also "elected" to make the harvesting advance, then knowing that the crop had mildew (Br. 31).

It is uncontroverted that at that time substantial quantities of the hops were free from mildew. The appellee then estimated that 50% of the crop was not affected by mildew and would meet contract requirements (Tr. 151, 196, 197). The harvest advance was figured on that basis (Tr. 113).

It is also uncontroverted that at that time Mr. Fry warned the appellee against picking mildewed hops, advised him to do the best he could, and to skip as many mildewed hops as he possibly could, and that it was understood by the two men that such would be done (Tr. 148, 152, 153, 149, 198). These statements by Mr. Fry are the only basis for the appellee's contention and the court's finding that the appellant "instructed" the appellee to continue picking the hops (Finding 7, Br. 51).

To what extent did the appellee comply with these "instructions"? According to his own testimony, he simply advised his pickers "to let the worst ones hang".

He did not even instruct the pickers to attempt to avoid the mildewed hops. He was content merely to rely upon the pickers' natural tendency to pick the heavier hops (Tr. 102, 134, 148, 153, 152). He left only 25% of the crop unharvested, although he knew that a full 50% of the crop was mildewed (Tr. 133, 151).

The baled hops showed this failure by the appellee to make even a reasonable effort to meet the contract requirements. Accurate representation of the entire lot by the samples in evidence is not questioned by the appellee. These samples, which speak for themselves, establish clearly the failure of the hops to comply with the contract description.

The warnings by Mr. Fry against picking mildewed hops, hereinabove referred to, were given when he was in the appellee's hop yard to deliver the harvest advance payment which the appellee had called for. The amount of that advance was increased from the $2,500.00 specified in the contract to $3,000.00 at the appellee's request because of increased wage rates demanded by the pickers. It is significant that at that time Mr. Fry insisted on using the 50% of the crop which the appellee estimated to be free from mildew, or 50 bales, as the basis for computing the amount of that harvesting advance (Tr. 110-113).

This advance payment in no way obligated the appellant to accept whatever hops might thereafter be processed, baled and tendered under the contract. The appellant had expressly reserved in the contract the right of subsequent inspection of the baled hops and rejection

of any hops not of the "quality, character and kind" described in the contract. As stated by the court in *Wigan v. LaFollett,* 84 Or. 488, at 497, 165 Pac. 579, the purpose of such contract provision for inspection and rejection is "to provide for the acceptance of such part of the crop raised as is of the quality specified in the contract and for the rejection of the balance."

The obligation under the contract of the buyer to advance harvesting money, and the provision for discharge of the buyer from that obligation if the hops to be harvested are not in such condition as to produce the quality called for under the contract, are entirely separate from the contract provision for ultimate inspection by the buyer of the baled hops with right of rejection. The provision for possible discharge of the buyer's obligations to make harvesting advances obviously is for the benefit and protection of the buyer. The appellant buyer could avail itself of that protection, or forego it, as it saw fit.

Furthermore, the appellant could escape from the contract obligation to make the harvest advance only if the hops were "not in such condition so as to produce the quality of hops called for" by the contract (Ex. 1, Tr. 13). The harvest advance of $3,000.00 was made when substantial quantities of mildew-free hops were apparent on the vines and which the appellee estimated at 50 bales, or 10,000 pounds. The amount of that advance was computed on the basis of a harvest cost of 30¢ per pound of that estimated quantity of contract quality hops (Tr. 103, 113, 114). Under these circumstances the contract provision for discharge of the ap-

pellant from the obligation to make the picking advance could not have come into operation.

Counsel's quotation (Br. 30) from the opinion of the court in *Livesley v. Johnston,* 45 Or. 30, at 48, 76 Pac. 13, 946, has been pulled out of its proper context and does not apply to the contract or circumstances here involved. That was a buyer's suit for specific performance of a grower's hop sale contract. The contract provided for picking advances to be paid by the buyer unless the buyer "shall determine" that the growing crop is not in proper condition. The defendant argued there was no contract for lack of mutuality, as under this provision the buyer was free to choose whether or not to make an advance and thus bound himself to nothing. The court held that in determining whether or not to advance the picking funds the buyer was obligated to exercise an honest judgment as to whether or not the crop was in proper condition, thus providing the essential mutuality.

In this case the contract provision is absolute, and permitted no exercise of judgment by the appellant with respect to whether or not the growing hops would produce hops of contract quality and the harvest advance thus be or not be required.

The court in the *Livesley* case analyzed and discussed not only the contract provisions relative to the buyer's right to withhold picking advances if the crop was not in proper condition, but also contract provisions relative to the buyer's subsequent right to inspect and reject the baled hops. It is clear that the court con-

sidered the provisions for inspection and possible rejection as separate from and not conditioned upon operation of the provisions relative to the making or withholding of picking advances.

The appellee has cited no instance and we know of none, among the many cases involving hop sale contracts, where a court has held or even intimated that the making of a hop harvesting advance by the buyer in some way precludes the buyer from thereafter asserting and relying upon his contract right to inspect the baled hops and reject those not of contract quality.

An impossible situation would result from a ruling that the making of a picking advance by a hop buyer at a time when there is possible doubt as to what quantity of contract quality hops will be produced, precludes the buyer's inspection and rejection of hops not of contract quality. Any hop buyer under contract to make such harvest advances would face the dilemma of either making the advances and being forced to accept at full contract price whatever hops were harvested and properly dried, cured and baled, or refusing to make such advances and thus incur possible liability for extremely heavy damages resulting to the grower from his inability otherwise to finance the harvest. It is obvious that such a situation is not intended by these contract provisions.

Counsel's quotation from 3 *Williston on Contracts,* Rev. Ed., Sec. 688 (Br. 31) is not applicable. Here there was no election by the appellant to continue under the contract after a known excuse. Further, the parties

here expressly agreed that the appellant buyer should have a subsequent right of inspection and rejection, which amounts, within the meaning of *Williston,* to a retention by the appellant of any excuse arising from failure of the hops to meet contract quality.

IV to VIII

Inasmuch as the appellee has adopted by reference its argument applicable to these headings in the Geschwill case (Br. 33), we incorporate by this reference the material in the reply brief in the Geschwill case, pages 13 to 20.

Respectfully submitted,

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